COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Investigation by the Department of Telecommunications And Energy on its own Motion into the Billing Services to be Provided by Electric Distribution Companies to Competitive Suppliers Serving Customers in their Service Territories.	)	D.T.E. 01-28 (Phase II)

REPLY COMMENTS OF COMPETITIVE SUPPLIERS

AES NewEnergy, Inc., AllEnergy Gas and Electric Marketing Company, L.L.C, Enron Energy Services, Exelon Energy Company, Green Mountain Energy Company, The NewPower Company, and SmartEnergy, Inc. (the "Competitive Suppliers") are pleased to offer the following brief Reply Comments regarding billing issues.

1. The Department has the Authority to Authorize a Supplier Single Bill Option.

The Department must consider billing questions in the overall context of its responsibility and authority to implement electric restructuring. Moreover, since the inability of suppliers to offer a single bill presents a real barrier to competition in Massachusetts, the Department cannot divorce this proceeding from D.T.E. 01-54 – a proceeding which the Department recently opened "with the intent to minimize or eliminate any barriers to competitive choice." D.T.E. 01-54, at 2.

First, the electric restructuring law specifically directs the Department to "establish rules and regulations to . . . promote effective competition." G. L. c. 164, § 1F(3).

Second, the Department has already concluded that a supplier single bill option would do exactly that. Specifically, the Department stated that:

> The Department agrees … that a billing option that would allow suppliers to send a single bill to their customers would assist in the development of a healthy competitive generation market, because supplier-sent invoices could allow the supplier to create a brand name and to advertise and charge for services that they provide.[1]

Third, as the regulatory agency charged with implementing Chapter 164, the Department has extensive authority to interpret the statute. Nuclear Metals, Inc. v Low-Level Radioactive Waste Management Bd., 656 N.E.2nd 563, 572, 421 Mass. 196 (1995) ("A state administrative agency in Massachusetts has considerable leeway in interpreting a statute it is charged with enforcing."); Cambridge Electric Light Company v Department of Public Utilities, 295 N.E.2nd 876, 888 363 Mass. 474 (1973) ("…a regulation under § 76C need not necessarily find support in a particular section of c. 164; ***it is enough if it carries out the scheme or design of the chapter and is thus consistent with it)*** (emphasis added).

Nonetheless, despite the Department's specific statutory responsibility to promote competition and its broad authority to interpret Chapter 164, the electric distribution companies have all argued that the Department is precluded from authorizing a supplier single bill. See *Comments of Massachusetts Electric Company and Nantucket Electric Company*, *Initial Comments of Western Massachusetts Electric Company*, and *Comments of Boston Edison Company, Cambridge Electric Light Company, and Commonwealth Electric Light Company, d/b/a NSTAR Electric*. The distribution companies' argument rests on the fact that an early version of the restructuring legislation specifically allowed a supplier single bill, whereas the final version does not address that option – neither authorizing it nor precluding it.

[1] *Report to the General Court Pursuant to Section 312 of the Electric Restructuring Act, Chapter 164 of the Acts of 1997 on Metering, Billing and Information Services* (December 29, 2000) ("MBIS Report"), p. 27.

However, the utilities fail to point out that the electric restructuring law is enormously complex and that the bill changed in innumerable ways as it moved through the Legislature. Indeed, even the billing section was changed in many significant ways between the House version and the final version. This is not a simple case of one version authorizing three billing options and a later version authorizing two options. The final version of the legislation extended the provision to cover gas companies, added appeal provisions, and was changed in many other ways.

Because of these many changes, the factual situation here is very different from the situation in Green v. Wyman-Gordon Company, 664 N.E. 2nd 808, 422 Mass. 551 (1996), the case relied on by Massachusetts Electric Company and Western Massachusetts Electric Company. As the Court noted in Green, the sentence at issue in that case "was in fact, 'the only pertinent deletion before Section 1C became law.'" 664 N.E. 2nd at 813. By contrast, the billing provision of the restructuring act changed in many pertinent ways before it became law.

Moreover, the Green court noted that "[d]eletions of ***limiting*** language from predecessor bills is normally presumed to be intentional." Id. (emphasis added). The language deleted from the early versions of the restructuring bill was not limiting, but rather quite the opposite. It was language that described an additional billing option.

The electric restructuring law was too complex, and there were too many changes, for us to be able to divine the legislature's intent by comparing an early version of the bill to the final version. Instead, we must look at the language that the legislature actually passed – language that specifically authorizes two billing options, and neither authorizes nor precludes a third. Under these circumstances, the Competitive Suppliers respectfully submit that it is well within the Department's authority, and consistent with its mandate to promote competition, to allow a

supplier consolidated bill. This is clearly in keeping with the Department's June 29, 2001 Order opening D.T.E. 01-54, which states in part: "The Massachusetts Department of Telecommunications and Energy ("Department") is committed to taking all appropriate steps to bring the benefits of industry restructuring to electricity consumers."

2. Pro Rata Application of Customer Payments.

The distribution companies offer a number of creative arguments against the application of customer payments on a pro rata basis. While masked in the language of consumer protection, these arguments are in fact about nothing more than the utilities' desire to be paid first.

The true motivation behind the utility position is exposed by their disparate treatment of Standard Offer and Default Service customers on the one hand from competitive supply customers on the other. For Standard Offer and Default Service customers, payments are effectively applied pro rata. That is, these customers are subject to disconnection if they fail to pay any portion of the bill. However, competitive supply customers are treated very differently. They are immune from disconnection as long as they pay a portion of the bill – the utility's portion.

The Competitive Suppliers have no desire to see customers disconnected. They do, however, have a strong desire (like the electric distribution companies) to be paid for the electricity they supply. They also have a strong desire for fair treatment. Competitive supply customers should be treated the same way as Standard Offer and Default Service customers;[2] customer payments should be applied pro rata between supply charges and distribution charges.

[2] The utilities offer a number of interesting arguments why these two groups of customers should be treated differently. For example, they suggest that customers that fail to pay Standard Offer charges should be subject to disconnection because the utility must pay its wholesale Standard Offer supplier whether or not the customer pays

3. The Department Should Carefully Consider the Competitive Suppliers' Initial Comments Regarding Payment Allocation Issues.

Clearly the current situation regarding allocation of partial payments is problematic, at best. The Competitive Suppliers, in their Initial Comments in this docket, suggested a number of solutions that would make the Massachusetts market more attractive to competitors, and in particular recommended utility assumption of supplier receivables. The Competitive Suppliers reaffirm their positions as stated in those Initial Comments and urge the Department to carefully consider those solutions. It is crucial to further development of a competitive market in Massachusetts that steps be immediately taken to correct this problem.

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the utility. Of course, as the Department is well aware, competitive suppliers are in exactly the same boat. They too must pay their wholesale suppliers whether or not they receive payment from the customer.

Respectfully submitted,

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